IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 428

HAROLD H. MOORE, Bankrupt
Petitioner

v.

LEONARD HORTON, Trustee in Bankruptcy,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

The Circuit Court of Appeals for the Sixth Circuit, in Deciding that the Bankrupt's Interest in His Father's Estate was Alienable Under Michigan Law and Therefore Vested in the Trustee in Bankruptcy Under Section 70a(5) of the Bankruptcy Act, Was in Complete Accord With the Law of Michigan.

Under the will of his father probated in Michigan many years prior to the bankruptcy, the Bankrupt, Harold H. Moore, had an interest or estate which would ripen into

possession if he survived his mother, the life beneficiary (R. 8-12). By the express terms of the will, the assets of the estate consisting principally of real estate were put in trust with a life interest to the Bankrupt's mother and provision made for termination of the trust and division of the assets equally between the Bankrupt and his sister upon the mother's death. As to the share devised to the Bankrupt, the will provided:

> "I give, devise, and bequeath to my son, Harold H. Moore, absolutely, one of said shares" (R. 10).

At the time the Bankrupt filed voluntary bankruptcy proceedings, his mother was approximately seventy-five years old and had been bedridden for many years (R. 47). She died some two years later while the bankruptcy proceedings were pending (R. 47). The Trustee in Bankruptcy had in the meantime filed a Petition claiming the right to the Bankrupt's interest in said estate (R. 6). The question was thus presented whether the Bankrupt's interest in said estate belonged to the Trustee in Bankruptcy under applicable provisions of the Bankruptcy Act.

The adjudication in bankruptcy herein having taken place prior to the amendment of June 22, 1938 (Ch. 575, 52 Stat. 879), the Bankruptcy Act of July 1, 1898 (as amended), Ch. 541, 30 Stat. 565, was operative. Section 70a of said act (U. S. C. A. Title 11, Sec. 110a) provided as follows:

> "The trustee of the estate of a bankrupt, upon his appointment and qualification * * * shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which

> is exempt, to all * * * (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him. * * *"

If the remainder interest of Harold H. Moore is 'property which prior to the filing of the petition he could by any means have transferred,' it passes under said act to the trustee in bankruptcy as an asset in bankruptcy. The standards by which we must judge whether property is capable of being transferred are determined by the local laws as declared by the state statutes and decisions.

> *6 Amer. Juris.*, Sec. 155, p. 600.
> *Spindle v. Shreve*, 111 U. S. 542, 28 Law. Ed. 512 (1884).
> *Suskin & Berry v. Rumley*, 37 Fed. (2d) 304 (C. C. A. 4, 1930).

In the *Suskin & Berry* case, *supra*, the Court held (305):

> "Whether such an interest in property passes to the trustee in bankruptcy and is subject to sale by him depends upon whether it is 'property which prior to the filing of the petition he (the bankrupt) could by any means have transferred or which might have been levied upon and sold under judicial process against him.' Bankruptcy Act, Sec. 70a(5), U. S. C. title 11 Sec. 110 (a) (5). And the determination of the question in a case such as this depends, not upon the law of the bankrupt's residence, but upon the law of the state where the trust was created and is being administered and where the property subject thereto is situate; that is, upon the law of Maryland."

The issue herein must therefore be determined by the law prevailing in Michigan 'where the trust was created

and is being administered and where the property subject thereto is situated.'

The Statutes in Michigan covering this situation are found in the following sections of the 1929 Michigan Compiled Laws:

"Section 12927. ESTATES IN LAND: KINDS AS RESPECTS TIME OF ENJOYMENT. Estates, as respects the time of their enjoyment, are divided into estates in possession, and estates in expectancy.

Section 12928. ESTATES IN POSSESSION AND IN EXPECTANCY; DEFINITION. An estate in possession is where the owner has an immediate right to the possession of the land; an estate in expectancy is where the right to the possession is postponed to a future period.

Section 12929. ESTATES IN EXPECTANCY; FUTURE INTERESTS; REVERSIONS. Estates in expectancy are divided into:

First: Estates commencing at a future day, denominated future estates; and

Second: Reversions.

Section 12930. FUTURE ESTATE: DEFINITION. A future estate is an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate, created at the same time.

Section 12931. REMAINDER. When a future estate is dependent upon a precedent estate, it may be termed a remainder, and may be created and transferred by that name.

Section 12933. FUTURE ESTATES; VESTED, CONTINGENT; DEFINITIONS. Future estates are either vested or contingent:

They are vested when there is a person in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate.

They are contingent whilst the person to whom, or the event upon which they are limited to take effect remains uncertain.

Section 12955. EXPECTANT ESTATES; QUALITIES. Expectant estates are descendible, devisable and alienable, in the same manner as estates in possession."

These statutes clearly and definitely place contingent remainders on a par with vested remainders insofar as their transferability is concerned, and by the express terms of these statutes, all such estates are transferable. There is no doubt that a vested remainder is descendible, devisable and alienable. *6 Amer. Juris.*, Sec. 156, p. 600. That a contingent remainder is likewise descendible, devisable and alienable under these statutes has been held in the following Michigan cases:

In re Coots' Estate, 253 Mich. 208, 234 N. W. 141 (1931);

Russell v. Musson, 240 Mich. 631, 216 N. W. 428 (1927);

Defreese v. Lake, 109 Mich. 415, 67 N. W. 505 (1896);

L'Etourneau v. Henquenet, 89 Mich. 428, 50 N. W. 1077 (1891);

Fitzhugh v. Townsend, 59 Mich. 427, 27 N. W. 561 (1886);

Goodell v. Hibbard, 32 Mich. 46 (1875).

In *Coots' Estate, supra*, the Court said (212):

"Concededly, the estate given to the nephews and nieces was a contingent remainder. 3 Comp. Laws

> 1915, Sec. 11531 (3 Comp. Laws 1929, Sec. 12933). The estate of each was descendible, devisable and alienable. 3 Comp. Laws 1915, Sec. 11553 (3 Comp. Laws 1929, Sec. 12955). The latter statute, however, did not enlarge the estate given, but merely established some of its incidents. Each remainderman 'could grant or devise no better or greater estate than he himself held; and any alienation or devise made by him would be defeated and destroyed by the same contingency which would have defeated his interest had he not disposed of it.' *Fitzhugh v. Townsend,* 59 Mich. 427, 436."

The sections of the Michigan Statutes above quoted are a portion of the Michigan Real Property Law which was literally adopted from the New York Real Property Law. *In re Coots' Estate, supra; In re Brown's Estate,* 198 Mich. 544, 559, 165 N. W. 929 (1917); *State v. Holmes,* 115 Mich. 456, 459, 73 N. W. 548 (1898). The New York Real Property Law (Consolidated Laws Ch. 50) contains the foregoing sections in practically identical form. This similarity of statutes makes decisions of the State of New York controlling precedents with respect to the question involved herein, particularly in the absence of any contrary decisions of the Supreme Court of Michigan.

The decisions in New York State, based upon the express provisions of statutes similar to the aforementioned Michigan statutes now definitely establish the rule that a bankrupt's remainder interest passes to his trustee in bankruptcy for the benefit of his creditors regardless of distinctions existing at the common law.

Clowe v. Seavey, 208 N. Y. 496, 102 N. E. 521 (1913).

Tracy v. Coyle, 201 N. Y. Supp. 250 (1923).

Clark v. Grosh, 142 N. Y. Supp. 966 (1912).

In re St. John, 105 Fed. 234 (D. C. 1900).
In re Brands' Trust, 281 N. Y. Supp. 548 (1935).
Harlan v. Archer, 79 Fed. (2d) 677 (C. C. A. 4, 1935).
6 Amer. Juris., Sec. 156, p. 601.

In view of the identity of the sections of the Michigan Real Property Law with similar sections of the New York Real Property Law, we submit that the aforementioned New York decisions are controlling of the instant question. It is therefore clear that under the Michigan law a remainder interest such as the Bankrupt had in his father's estate passes to his Trustee in Bankrupty for the benefit of his creditors.

The Michigan cases cited by petitioner have no bearing upon the issues herein presented and are in no respect in conflict with the applicable law as contained in the foregoing statutory and judicial statements. As to the cases cited by petitioner from other jurisdictions, an analysis of them discloses that they are either inapplicable to the issues herein presented or arise in states having no statutes similar to those contained in Michigan.

Section 12982 (Michigan Compiled Laws 1929), cited in the Bankrupt's Petition at page 15, does not in any manner preclude the application of said Section 12955 to a trust beneficiary's interest in an estate. In both the *Coots'* case, *supra,* and the *Fitzhugh* case, *supra,* a trust similar to the instant trust was involved, and the Michigan Supreme Court held that the contingent remainderman's interest in the trust was an "estate" and was descendible, devisable and alienable under said Section 12955. It is conceded that this "estate" might be divested or defeated by the decease of the contingent remainderman prior to the life tenant, but it is nevertheless an estate which can be alienated.

Aside from the presence and effect of Section 12955, it is submitted that the Bankrupt's contention with respect to Section 12982 is directly contrary to the accepted common law rule which permits beneficial interests in trusts to be freely transferred and alienated unless such interests are made inalienable by the express provisions of the trust, as in valid spendthrift trusts, or by express statutory language.

1 Scott on Trusts (1939), pages 699, 700, 701, 732;
1 Bogart, Trusts and Trustees (1935), page 525.

The remainder interest of the Bankrupt sought to be reached by his creditors is not within any of the recognized exceptions of the general common law rule. Petitioner states in his brief that "The District Court found as a fact that the settler's intention was such as to make this a spendthrift trust (R. 38)" (Petitioner's Brief, p. 14). No such finding is to be found on page 38 of the Record or on any other page. The will, which is contained in the Record in its entirety (R. 8-12), makes no pretense at creating a spendthrift trust for the Bankrupt.

Petitioners attempted distinction between the rules applicable to real and personal property is not justified in view of the adjudication by the Michigan Supreme Court in the cases of *Hadley v. Henderson*, 214 Mich. 157, 183 N. W. 75 (1921) and *In re Coots' Estate, supra.* In the *Coots'* case the Court said (214):

> "It is argued that the Hadley case concerned the right to take personal property, a money bequest, and the present case involves real estate. That such difference might be of consequence was not suggested in the Hadley opinion. The Court applied to the bequest the law of real estate, both statutory and by citation of decision. Moreover, the rules governing future interests in real and

> personal property are substantially the same. *23 R. C. L.* p. 525; *Wessborg v. Merrill, supra; Winslow v. Goodwin,* 7 Metc. (48 Mass.) 363."

See also *3 Simes, Law of Future Interests,* Sec. 713, 714; *Meyer v. Reif,* 217 Wis. 11, 258 N. W. 391 (1935).

It is respectfully submitted that under the law of Michigan, the interest of the Bankrupt in his father's estate was alienable and was thus clearly such property as belonged to the Trustee in Bankruptcy under the Bankruptcy Act.

II.

The Decision of the Circuit Court of Appeals Is Not In Conflict With the Decisions of Any Other Circuit Court of Appeals or of This Court.

As hereinbefore set forth, the Circuit Court of Appeals by its decision herein, was required merely to ascertain the law of Michigan as to the alienability of the Bankrupt's interest in his father's estate. None of the decisions of any other Circuit Court of Appeals in any way holds that the law of Michigan is different than that adjudicated by the Circuit Court of Appeals in the instant decision. Such other Circuits as have passed upon the question of whether such property belonged to the Trustee in Bankruptcy have made no attempt at enunciating any rule other than that they were bound to ascertain the law of the local state as to whether the property in question was alienable.

As this Court pointed out in *Ruhlin v. New York Life Ins. Co.,* 304 U. S. 202, 206, 82 L. E. 1290, 1292:

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference in opinion in the state courts."

It is respectfully submitted that no valid basis has been advanced by petitioner for the granting of certiorari in the instant case.

Respectfully submitted,

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